

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2009 MSPB 171

Docket No. PH-4324-09-0188-I-1

**Albert J. Palumbo, Jr.,
Appellant,**

v.

**Department of the Interior,
Agency.**

August 28, 2009

Frank Russo, Cheltenham, Pennsylvania, for the appellant.

Martha F. Ansty, Esquire, Essex Junction, Vermont, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant petitions for review of the initial decision, issued April 14, 2009, that dismissed his appeal under the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at [38 U.S.C. §§ 4301-4333](#)) (USERRA) for lack of jurisdiction. For the reasons set forth below, the Board GRANTS the appellant's petition, REVERSES the initial decision, and REMANDS the appeal for further adjudication.

BACKGROUND

¶2 The appellant filed an appeal alleging that the agency violated USERRA by not retaining him in employment and not affording him a career appointment, and

he requested a hearing regarding these matters. Appeal File, Tab 1. The administrative judge informed the appellant that, under USERRA, the Board has jurisdiction over an appeal alleging discrimination in federal employment on account of prior military service, and that a person may submit an appeal against an agency alleging discrimination on the basis of prior military service directly to the Board or may submit such an appeal to the Board after first filing a complaint and exhausting procedures with the Secretary of Labor. Appeal File, Tab 2. The administrative judge, therefore, ordered the appellant to indicate whether he had filed his appeal directly with the Board or whether the Board must delay adjudication because he first submitted his complaint to the Secretary of Labor. *Id.*

¶3 In response, the appellant indicated that he filed his complaint directly with the Board. Appeal File, Tab 4. The appellant also asserted that he was a disabled veteran who had been serving in an intermittent status under term appointments and that the agency failed to consider him for any career conditional appointments during his period of employment. *Id.* The agency moved that the appeal be dismissed for lack of jurisdiction, and the administrative judge afforded the appellant the opportunity to submit information establishing Board jurisdiction. Appeal File, Tabs 5, 6. The appellant then reiterated that he was a veteran, and further asserted that he had applied for a career conditional Custodial Worker Leader position, that the agency improperly determined that he was ineligible for the position because he “did not provide sufficient proof of status,” and that the agency discriminated against him by selecting a non-veteran for the position. Appeal File, Tab 7.

¶4 The administrative judge then dismissed the appeal for lack of jurisdiction without holding the requested hearing, finding as follows: (1) The appellant was required to initially show by “preponderant evidence” that his military status was at least a motivating or substantial factor in the agency action; (2) the appellant did not present a nonfrivolous allegation that his military status or service was a

motivating or substantial factor in the non-selection at issue because he failed to explain or present evidence showing that he was eligible for consideration for the position or that his prior military service was a substantial or motivating factor in his non-selection; and (3) the appellant did not present any evidence that the agency denied him advancement to a career conditional appointment based upon his prior military service. Appeal File, Tab 10.

¶5 In his petition for review, the appellant asserts that he presented a nonfrivolous allegation of jurisdiction, and again requests a hearing on the merits of his appeal. Petition for Review File, Tab 1.

ANALYSIS

¶6 To establish Board jurisdiction over a USERRA discrimination appeal arising under [38 U.S.C. § 4311\(a\)](#), the appellant must allege the following: (1) He performed duty or has an obligation to perform duty in a uniformed service of the United States; (2) the agency denied him initial employment, reemployment, retention, promotion, or any benefit of employment; and (3) the denial was due to the performance of duty or obligation to perform duty in the uniformed service. A claim under USERRA is broadly and liberally construed in determining whether it is nonfrivolous. *Lubert v. U.S. Postal Service*, [110 M.S.P.R. 430](#), ¶ 11 (2009); *Downs v. Department of Veterans Affairs*, [110 M.S.P.R. 139](#), ¶ 15 (2008).

¶7 An allegation that an employer took or failed to take certain actions based on an individual's military status or obligations constitutes a nonfrivolous allegation entitling the appellant to Board consideration of his claim. *Baker v. Department of Homeland Security*, [111 M.S.P.R. 277](#), ¶ 12 (2009); *Williams v. Department of the Army*, [109 M.S.P.R. 206](#), ¶ 5 (2008). Further, evidence that the agency hired a non-veteran instead of the appellant also constitutes a nonfrivolous allegation of discrimination sufficient to establish USERRA jurisdiction. *Williams v. Department of the Treasury*, [110 M.S.P.R. 191](#), ¶ 10

(2008). Once an appellant has established jurisdiction over his USERRA appeal, he has an unconditional right to a Board hearing. *Downs*, [110 M.S.P.R. 139](#), ¶¶ 17-18.

¶8 Here, the appellant has presented nonfrivolous allegations that support a finding of jurisdiction. Specifically, he has alleged that he is a veteran, that the agency denied him employment, and that the agency discriminated against him in this regard by selecting a non-veteran for the position in question. Appeal File, Tabs 4, 7. The appellant also presented evidence showing that the agency did not select him for the position, and the agency has not disputed the appellant's claim that it selected a non-veteran for the position. Appeal File, Tabs 7, 8. Because the appellant has established Board jurisdiction, he is entitled to the hearing he sought. *See Downs*, [110 M.S.P.R. 139](#), ¶¶ 17-18.

ORDER

¶9 Accordingly, we REMAND this appeal to the Northeastern Regional Office for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.